EON Bank Berhad v Cepad Group Sdn Bhd & Ors

HIGH COURT (KUCHING) — CIVIL SUIT NO 22–17 OF 2000–II
LAU BEE LAN J
10 MARCH 2006

Evidence — Admissions — Paragraph and exhibit in plaintiff's affidavit in opposition — Admissibility of — Exhibit did not bear words 'on a without prejudice basis' — Whether an attempt at settlement on a without prejudice basis — Whether privileged — Whether privilege waived

The plaintiff commenced an action against the fifth defendant on 14 February 2000. The fifth defendant filed his defence on 7 April 2000 disputing the plaintiff's claim. By a letter dated 10 November 2003, the fifth defendant gave notice that he will be raising a preliminary objection to the admissibility of para 4(f) and exh STL-2 of the plaintiff's affidavit in opposition on the ground that the said paragraph and the particulars of the exh was an attempt at settlement on a without prejudice basis being privileged and therefore was inadmissible as evidence. The fifth defendant's preliminary objection was dismissed. This was the fifth defendant's appeal pursuant to O 56 r 1 of the Rules of the High Court 1980 ('the RHC') against the dismissal of the fifth defendant's preliminary objection.

Held, allowing the appeal:

(1) Although exh STL-2 did not bear the words 'on a without prejudice basis', exh LHW-2, a letter dated 12 December 2002 written by the fifth defendant in relation to the ongoing negotiation for settlement fortify the fact that exh STL-2 was made on a without prejudice basis and was therefore privileged (see para 8).

(2) It was the plaintiff and not the fifth defendant who brought out the issue of without prejudice negotiation between the plaintiff and the fifth defendant. The fifth defendant was entitled to object to the admissibility of the disclosure of the without prejudice negotiation and then said that the version given by the plaintiff was wrong and thereafter gave his own version. Premised on the principle in the case of *Sobell v Boston & Ors* [1975] 2 All ER 282 this does not amount to a waiver. The fifth defendant has not waived the privilege and the right to object to para 4(f) and exh STL-2 in the plaintiff's affidavit in opposition (see para 11).

[Bahasa Malaysia summary

Plaintif telah memulakan satu tindakan terhadap defendan kelima pada 14 Februari 2000. Defendan kelima telah memfailkan pembelaannya pada 7 April 2000

mempertikaikan tuntutan plaintif. Melalui surat bertarikh 10 November 2003, defendan kelima telah memberi notis bahawa beliau akan mewujudkan satu bantahan awal terhadap kemasukan perenggan 4(f) dan eksh STL-2 afidavit plaintif bertentangan atas alasan bahawa perenggan tersebut dan butir-butir eksibit adalah satu percubaan penyelesaian 'tanpa penjejasan' (without prejudice) menjadi prejudis dan oleh itu tidak boleh diterima sebagai keterangan. Bantahan awal defendan kelima telah ditolak. Ini merupakan rayuan defendan kelima berikutan A 56 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap bantahan awal defendan kelima.

Diputuskan, membenarkan rayuan:

(1) Walaupun eksibit STL-2 tidak menggunakan perkataan-perkataan 'tanpa prejudis' eksh LHW-2, satu surat bertarikh 12 Disember 2002 yang telah ditulis oleh defendan kelima berkenaan dengan perundingan berterusan bagi penyelesaian telah memperkuatkan pernyataan bahawa eksh STL-2 telah dibuat berdasarkan alasan tanpa prejudis dan oleh itu adalah istimewa (see para 8).

(2) Plaintif dan bukannya defendan kelima yang telah menimbulkan isu perundingan tanpa prejudis antara plaintif dan defendan kelima. Defendan kelima adalah berhak untuk menolak penerimaan pendedahan perundingan tanpa prejudis dan telah menyatakan bahawa versi yang diberikan oleh plaintif adalah salah dan kemudiannya telah memberikan versinya. Berdasarkan prinsip di dalam kes *Sobell v Boston & Ors* [1975] 2 All ER 282, ini tidak merupakan satu penepian. Defendan kelima masih belum menepikan keistimewaan ini dan hak untuk menolak perenggan 4(f) dan eksibit STL-L di dalam afidavit plaintif bertentangan (see para 11).]

Notes

For cases on paragraph and exhibit in plaintiff's affidavit in opposition, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2094–2095.

Cases referred to

A-B Chew Investments Pte Ltd v Lim Tjoen Kong [1989] 3 MLJ 328 (refd)
Malayan Banking v Foo See Moi [1981] 2 MLJ 17 (refd)
Oh Kuang Liang v Associated Wood Ind Sdn Bhd [1995] 4 MLJ 390 (refd)
Sobell v Boston & Ors [1975] 2 All ER 282 (refd)
Yeoh Kee Aun v PI Capital Asset Management [2000] 4 MLJ 508 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(b), (d), O 56 r 1

Seri Afidah Bujang (Majid & Co) for the plaintiff.
Kenny Yi (Yi & Co) for the five defendants.

Lau Bee Lan J:

[1] The appellant/fifth defendant pursuant to O 56 r l of the Rules of the High Court 1980 ('the RHC') has appealed against the decision of the learned deputy registrar made on 20 November 2003 dismissing the fifth defendant's preliminary objection with costs (encl 347). The fifth defendant filed a summons in chambers application dated 22 August 2003 pursuant to O 18 r 19(b), (d) of the RHC, inter alia, for an order:

(i) that the writ of summons and the statement of claim both dated 14 February 2000 be struck out on the ground that the statement of claim is scandalous, frivolous, vexatious and/or an abuse of the process of the court; and

(ii) the cost of application be for the fifth defendant.

[2] In support of the application the fifth defendant filed the affidavit in support of Datuk Lau Hieng Wui affirmed on 20 August 2003 ('the fifth defendant's affidavit') and Affidavit in Support II of Datuk Lau affirmed on 27 October 2003 ('the fifth defendant's second affidavit'). The plaintiff opposed the application by the affidavit in opposition of Stephen Tom Lannau affirmed on 30 September 2003 ('the plaintiff's affidavit in opposition').

[3] By way of background the brief facts are as follows. The plaintiff commenced the action against the fifth defendant on 14 February 2000. The fifth defendant filed his defence on 7 April 2000 disputing the plaintiff's claim. By a letter dated 10 November 2003 the fifth defendant gave notice that he will be raising a preliminary objection to the admissibility of para 4(f) of the plaintiff's affidavit in opposition. The plaintiff vide their letter dated 16 July 2004 gave notice that they will be raising a preliminary objection against the competency of the fifth defendant's appeal. On 31 July 2004, I had dismissed the preliminary objection of the plaintiff with cost.

[4] Basically the fifth defendant sought to expunge para 4(f) and exh STL-2 of the plaintiff's affidavit in opposition on the ground that the said paragraph and the particulars of the exhibit was an attempt at settlement on a without prejudice basis being privileged and therefore is inadmissible as evidence and the case of *Malayan Banking v Foo See Moi* [1981] 2 MLJ 17 was cited in support.

[5] Essentially the plaintiff opposed the application on the ground that the fifth defendant cannot claim any privilege that para 4(f) and exh STL 2 of the plaintiffs affidavit in opposition was made on a without prejudice basis and that the fifth defendant's preliminary objection is premature at this stage of hearing and the proper time for objecting to the adrnissibility would be when the plaintiff's summary judgment application came up for hearing.

[6] The court has considered the written submissions and reply including the authorities submitted (on preliminary objection) of the learned counsel for the fifth defendant and the plaintiff namely encls 380, 381, 387 and 388 and encls 382, 383 and 385 respectively. As to the meaning of what constitutes communication without prejudice, I quote the passage in *Oh Kuang Liang v Associated Wood Ind Sdn Bhd* [1995] 4 MLJ 390 (cited by the fifth defendant), where Abdul Malik Ishak J at p 392C to E referred to 17 *Halsbury's Laws of England* (4th Ed) at para 212 as follows:

> Letters written and oral communication made during a dispute between the parties, which are written or made for the purpose of steeling the dispute, and which are expressed or otherwise proved to have been made 'without prejudice', cannot generally be admitted in evidence. The rule does not apply to communications which have a purpose other than settlement of the dispute; thus, it does not apply in respect of a document which, from its character, may prejudice the person to whom it is addressed. The privilege, where it exists, cover not only the particular letter itself but also all subsequent parts of the same correspondence on both sides, even if they are not expressed to be 'without prejudice', unless there is a clear break in the chain of correspondence to show that the ensuing letters are open. Moreover, it has been held to cover an open letter, followed by another from the same party to effect that their communications were intended to be 'without prejudice'. His Lordship Abdul Malik Ishak J at p 394G to I - further stated, 'I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words 'without prejudice' - to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the 'without prejudice rule' would be by balancing two different public interests, namely, the public interest in promoting settlements, on the other hand, and the public interest in full discovery between parties to litigation, on the other.

[7] The public policy approach of encouraging litigants to settle their differences amicably is borne out in the judgment of Chang Min Tat FJ in *Foo See Moi* as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is an order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of agreement, unless of course the agreement has become incorporated in another document which would then be evidence of the agreement.

[8] Based on the facts of this instant case the fifth defendant did not allude to any without prejudice negotiation as he merely deposed the ground in support of his application of striking out the writ of summons and the statement of claim by stating that the act of the plaintiff is prejudicial, oppressive an unfair to him for the reason stated in para 5 (i) to (iv) of the fifth defendant's affidavit. It was the plaintiff who adverted to the without prejudice negotiation in para 4(f) and also exh STL 2 therein

in the plaintiffs affidavit in opposition when opposing the fifth defendant's application. The plaintiff submitted that exh STL 2 is not a letter but a note minuting what had transpired at the meeting that took place at plaintiff's Head Office between the plaintiff's officer and the fifth defendant. However, it is to be noted that the heading of exh STL 2 states 'CONVERSATION' and following the principle of law in 17 *Halsbury's Laws of England'such oral communication made during a dispute between the parties which are written or made for the purpose of settling the dispute and which are expressed or otherwise proved to have been made without prejudice cannot generally be admitted in evidence.'* In this instant case it is my view that although exh STL 2 does not bear the words 'on a without prejudice basis', exh LHW 2, a letter dated 12 December 2002 written by the fifth defendant in relation to the ongoing negotiation for settlement fortify the fact that exh STL 2 is made on a without prejudice basis and is therefore privileged.

[9] The learned counsel for the plaintiff cited the case of *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] 3 MLJ 328 at p 329 wherein Comaraswamy J held that 'a party cannot unilaterally waive privilege only to claim it later when his adversary responds by making further reference to the 'without prejudice negotiations'; 'the defendant cannot be allowed willfully to breach the law on 'without prejudice' negotiations and then when he finds the consequences to his disadvantage, make claim to the privilege and 'the privilege only applies to statements by the parties and solicitors respectfully acting for them…'. I agree with the learned counsel tor the fifth defendant that the facts of this instant case is different from *A-B Chew Investments Pte Ltd* because in the first place, it was the plaintiff who brought the without prejudice negotiation between the plaintiff and the fifth defendant first. The fifth defendant only disclosed the settlement reached between the plaintiff and the second and third defendants and not to his without prejudice negotiation between himself and the plaintiff in his affidavit in support (paragraph five of the fifth defendant's affidavit). It was the plaintiff in response to the disclosure of the settlement reached between the plaintiff and the second and third defendants who brought up the without prejudice negotiation between them and the fifth defendant (para 4(f) of the plaintiff's affidavit in opposition). Secondly, the fifth defendant had reserved his rights to object to the admissibility of para 4(f) of the plaintiff's affidavit in opposition in para 12 of the fifth defendant's second affidavit.

[10] 1 agree with the learned counsel for the fifth defendant that the facts of the case of *Sobell v Boston & Ors* [1975] 2 All ER 282 which was cited in *A-B Chew Investments Pte Ltd* is more relevant. In that case, the plaintiff filed an affidavit where he referred to a privileged discussion with the defendant. In reply, the defendant filed an affidavit to correct the plaintiffs version. The defendant also stated that the conversation was without prejudice. The plaintiff subsequently contended that the privilege was waived on the ground that the defendant had let in the evidence by giving his own version in his affidavit. In making the finding that this did not amount to a waiver. Goff J (as he then was) observed at p 287:

> Where the evidence is given by affidavit the opposing party is faced with a dilemma. If he says, merely, I am advised that this is inadmissible and I need not answer it', then if the objection is overruled he must seek an adjournment which may not be allowed or which may be allowed only on adverse terms as to costs and if he does not, or if his application be not granted, he will be left with no evidence on his side. I cannot think that the privilege can be waived by the affidavit which says, I object that my opponent's affidavit is inadmissible because the matter it contains is privilege, but in any case should the evidence be received, I say that it is wrong, and this is my version'. Of course, when the affidavits are being read counsel should at once object, and if he allows the offending exhs to be read without objection, he may well waive the privilege despite the form of his own affidavit, but here counsel for the defendants made it clear from the outset that he did object, and I only received the affidavits on this point de bene esse pending argument.

[11] Reverting to the instant case, I agree with the learned counsel for the fifth defendant that it was the plaintiff and not the fifth defendant who brought out the issue of without prejudice negotiation between the plaintiff and the fifth defendant. The fifth defendant is entitled to object to the admissibility of the disclosure of the without prejudice negotiation and then say that the version given by the plaintiff is wrong and thereafter give his own version. Premised on the principle in the case of *Sobell* this does not amount to a waiver. Therefore, I am of the view that the plaintiff's submission in paras 12 and 13 of encl 383 that the fifth defendant had waived the privilege and the right to object to para 4(f) and exh STL 2 in the plaintiff's affidavit in opposition is without merits.

[12] The plaintiff further submitted that the fifth defendant's preliminary objection is premature based on the case of *Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor* [2000] 4 MLJ 508. I agree with the submission of the learned counsel for the fifth defendant with regards to the application of the procedure adverted to by Steve Shim J (as he then was) in paras 1.15, 1.16 and 1.17 of encl 387. In the case of *Yeoh Kee Aun* the proposed intervener (respondents) took out an application to intervene and to set aside the ex-parte order dated 14 May 1996. The application of the proposed intervener was marked as encl 7. One Yeoh Kee Aun took out an application to strike out certain parts of the affidavit filed by the proposed intervener. As to the appropriate timing for the objection, Steve Shim J (as he then was) observed at p 512:

> I am of the firm view that if the applicant considers those portions aforesaid to be scandalous and irrelevant, the proper time for objecting to their admissibility would be when the respondents' application at encl 7 came up for hearing.

[13] In the context of the instant case, this is what the fifth defendant did. When the fifth defendant's application to strike out the plaintiffs writ of summons and statement of claim came up for hearing, the fifth defendant objected to admissibility of para 4(f) of the plaintiff's affidavit in opposition as was done in the case of *Yeoh Kee Aun*. Hence, the contention of the plaintiff that the fifth defendant's objection is premature is again without merits.

[14] In the circumstances, for the reasons given. I reverse the decision of the learned deputy registrar and hereby allow the appeal of the fifth defendant with costs to be taxed unless otherwise agreed.

Appeal allowed with costs to be taxed.

Reported by Peter Ling